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Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

MARIE MANHART, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

The question presented in this case is whether a retirement plan which requires women employees to contribute from their wages nearly 15% more than similarly situated male employees because of the longer average life expectancy of women violates the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2.

STATEMENT OF THE CASE.

A. Nature of the Case.

This is a class suit by female employees of the Los Angeles Department of Water and Power ("Water and Power") who are participating, or who have participated, in the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan ("Pension Plan" or "Plan"). Respondents are contending that the Plan's use of sex-segregated mortality tables to determine employee contribution rates violated various federal statutes, including Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e-2(a)(1), (2)), and the United States and California Constitutions. Suit was brought on September 26, 1973 against Water and Power, Members of the Board of Water and Power Commissioners ("Commissioners") and Members of the Board of Administration of Water and Power's Plan ("Plan Administrators") (R. 1).[1]

Because the Plan's tables purported to show that women as a class live longer than men, Water and Power required its female employees to contribute approximately 15% more to the Plan than their male counterparts to receive the same benefits. Accordingly, Respondents sought an injunction ordering Petitioners to equalize male and female contribution rates under the Plan and to grant class members restitution of money they were illegally forced to contribute to the Plan in excess of contributions made by similarly situated male employees (R. 18).

The District Court permanently enjoined Petitioners under Title VII from requiring female Water and Power employees to make larger contributions to the Plan

[1]"R" refers to the record on appeal in this case.

than their male counterparts. The Court further awarded class members a refund of illegally required contributions made on and after April 5, 1972 (R. 369).[2] The Court of Appeals affirmed this decision and denied defendants a rehearing *in banc*.

B. History of the Case.

Respondents Mayshack, Stoop, Muller and Lehman are female employees of Water and Power. Respondent Manhart, also a female, is a former employee of Water and Power, now retired. The Committee to Protect Women's Retirement Benefits is an association of female supervisory employees of Water and Power. The International Brotherhood of Electrical Workers, Local Union No. 18 ("IBEW") is an unincorporated labor organization whose members include certain women employed by Water and Power (R. 12-15).

Water and Power employs or has employed approximately 2,500 women who are participating or have participated in its Plan (R. 12). The Plan Administrators administer the Plan and the Commissioners have final responsibility for making decisions concerning operation of the Plan (R. 15-16). Water and Power is required to maintain the Plan for its employees under Los Angeles City Charter, Section 220.1.

Water and Power's Plan is contributory, *i.e.*, it is funded in part by employee contributions, and participation is mandatory for all Water and Power employees (R. 173). The Plan used sex-segregated mortality tables to determine employee contribution rates. Because these

[2]On April 5, 1972, the Equal Employment Opportunity Commission issued guidelines prohibiting contribution rate differentials based on sex in employee benefit plans. 29 C.F.R. 1604.9 (b), (e), (f). See *infra*.

tables purport to show that women as a class live longer than men, women are required to contribute 14.84% more to the Plan than male employees entering the Plan at the same age (R. 173, 311-312). Thus, for example, Ms. Manhart paid over $5,000 more to the Plan from 1950 to her retirement than her male counterpart (R. 176).

Money contributed to the Plan is required by Los Angeles City Charter, Section 220.1(f) to "be kept separate and apart from all other money on deposit with the City Treasurer." Water and Power's chief accounting employee (who is also the chief accounting employee for the Plan Administrators) is the only person authorized to withdraw money from the Plan.

IBEW, on or about June 5, 1973, filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Water and Power's Plan discriminated against female Water and Power employees because it required them to contribute more to the Plan than their male counterparts. The United States Department of Justice issued Respondents a Notice of Right to Sue letter on or about September 17, 1973 (R. 12). Respondents filed their complaint in Federal Court on September 26, 1973.

Respondents alleged in their complaint that Water and Power's use of sex-segregated mortality tables to determine employee contribution rates to the Plan violated Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-2(a)(1), (2)), the Civil Rights Act of 1871 (42 U.S.C. §1983), the Fourteenth Amendment to the United States Constitution, and Article I, Sections 1 and 21 of the California Constitution (Section 21 is now embodied in Section 7(d))

(R. 13). Jurisdiction is asserted under 28 U.S.C. §§1331, 1343(3), 1343(4), 2201 and 2202. The amount in controversy exceeds $10,000 (R. 12).

On January 15, 1975, the District Court issued a preliminary injunction prohibiting Water and Power from requiring larger contributions to the Plan from individual female employees than from similarly situated individual male employees. After an analysis of existing case law and other authorities, the Court held that "sexual discrimination under Section 703(a)(1) [42 U.S.C. §2000e-2(a)(1)] exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class." It concluded that Water and Power violated Title VII "by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees." (R. 323).

On December 26, 1974, while the Court's opinion was in draft form, Petitioners notified the Court that they "had adopted a resolution on December 23, 1974, equalizing male and female contributions to the Retirement Plan." (R. 326). The resolution was effective January 1, 1975. Also effective on and after January 1, 1975, the California Legislature in Government Code, Section 7500 made it unlawful for a municipal pension and retirement system to require greater contributions from employees of one sex than from employees of another sex who are the same age.

The District Court issued a permanent injunction on June 20, 1975, enjoining Water and Power from requiring female employees to make larger contributions to the Plan than their male counterparts. The Court

also ordered Water and Power to refund to class members, with 7% interest, contributions female employees were required to make to the Plan in excess of contributions required from similarly situated male employees on and after April 5, 1972 (R. 369). On April 5, 1972, the EEOC issued guidelines prohibiting contribution rate differentials based on sex in employee benefit plans.[3]

The Court of Appeals affirmed the judgment of the District Court with respect to Respondents' cause of action under Title VII on November 23, 1976. On December 7, 1976, Petitioners filed a Petition for Rehearing and Suggestion that Rehearing be *In Banc*. That same day, this Court decided *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976). The Court of Appeals, following a second analysis of the instant action, found that *Gilbert* did not require a change in its judgment and denied Petitioners' Petition on April 18, 1977. The Court found that the mortality tables used by Water and Power were explicitly sex-based and discriminated against women in violation of Title VII. It stated:

> "A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is

[3]The District Court earlier dismissed Respondents' cause of action under 42 U.S.C. §1983 on the ground that the Commissioners and Plan Administrators in their official or representative capacities were not persons within the meaning of Section 1983 (R. 121). This deprived Respondents of the benefit of the three-year statute of limitations applicable to Section 1983 actions and prevented class members from receiving a refund of illegally required excess contributions made to the Plan between September 26, 1970 and April 5, 1972. The Court of Appeals, however, found that this order was interlocutory and refused jurisdiction. Like Respondents' other causes of action, it is still pending before the District Court.

> the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d at 593.

On or about June 20, 1977, Petitioners petitioned this Court for a Writ of Certiorari directed to the Court of Appeals. The Petition was granted on October 12, 1977.

SUMMARY OF ARGUMENT.

Water and Power used sex-segregated mortality tables to determine employee contributions to its Plan. The tables, although designed to predict longevity, did not use other more relevant factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history. Because the tables showed that women as a class live longer than men, Water and Power required its female employees to contribute approximately 15% more to the Plan than their male counterparts to receive the same benefits. Respondents submit that this practice violated Sections 703(a)(1) and (a)(2) of the Civil Rights Act of 1964, as amended.

There are two tests for establishing a *prima facie* case of employment discrimination under Title VII: (1) Is the classification discriminatory on its face; or, if it is not, (2) is the classification discriminatory in its impact? Water and Power's Plan, without suf-

ficient justification, discriminated against women under both these tests.

Once a *prima facie* case of explicit sex-based discrimination is established, the employer has the burden of justifying its classification as a *bona fide* occupational qualification ("BFOQ"). The BFOQ defense, however, is only available in cases involving discrimination in hiring. Thus, although Water and Power's use of sex-segregated tables is explicitly sex-based, it is not protected from Title VII's anti-discrimination mandate under the BFOQ exemption. In any event, even if the BFOQ defense could be applied outside the scope of hiring, Water and Power's rationale for using sex-segregated tables does not meet the BFOQ test.

The Court has suggested that in some instances a Fourteenth Amendment analysis may be helpful in determining whether a practice is discriminatory under Title VII. Because the instant case involves an explicit sex-based classification, however, the threshold determination that Water and Power's practice was discriminatory cannot be disputed. A Fourteenth Amendment approach also is inapposite to the instant case because it would provide greater protection under Title VII to blacks than to women, a result clearly not contemplated by Congress.

Nevertheless, Water and Power's use of sex-segregated tables also was discriminatory under the Fourteenth Amendment. In fact, the instant case presents an equal protection question considered in a long line of Fourteenth Amendment cases invalidating statutes which employed gender as an inaccurate substitute for other and more relevant bases of classification. These cases have refused to attribute group sex characteristics to individual women (or men) where there was a weak congruence between sex and the characteristic or where it would violate the intent of Title VII that persons of like qualifications be treated alike.

Water and Power's Plan also discriminated against women in its impact. Because women as a class live longer than men, Water and Power required female employees to contribute more from their wages than similarly situated male employees. The result was that these women had less discretionary income to provide for themselves and their families and were burdened to an extent men were not. For example, Marie Manhart contributed over $5,000 more than her male counterpart during her employment with Water and Power.

Water and Power cannot justify its use of sex-segregated tables as a business necessity. Not only does this practice serve no business purpose, but two alternative methods of predicting longevity which are not based solely on sex are available: the sex-neutral table and the multi-factor table. The sex-neutral table pools the risk of longevity associated with sex among all covered employees in the same manner as other longevity risks already are pooled; the multi-factor table is based on a variety of factors which affect longevity.

Water and Power's use of sex-segregated tables violated Title VII as interpreted both by the EEOC and the Labor Department. The EEOC, established by Congress to enforce the anti-discrimination mandate of Title VII, has issued guidelines specifically making it an unlawful employment practice for an employer "to have a pension or retirement plan which differentiates in benefits on the basis of sex." 29 CFR §1604.9

(f). The EEOC applied its guidelines to a case identical to the instant case and struck down the employer's practice as unlawful.

Title VII is tied to the Equal Pay Act through Section 703(h). This section, popularly known as the Bennett Amendment, provides that it shall not be an unlawful employment practice for an employer to treat men and women differently "if such differentiation is authorized by the provisions of section 206(d) of the Equal Pay Act." Section 206(d) permits, among other things, "a differential based on any other factor other than sex. . . ." Section 206(d)(1)(iv).

The Labor Department has always maintained that sex-based wage differentials, to qualify under Section 206(d)(1)(iv), must reflect all employment costs and not just a selected few. Thus, it has struck down wage differentials based on data showing that pension and other benefits cost more per hour for women than for men. The Labor Department's position is set forth in an Interpretive Bulletin and various other rulings.

Senator Humphrey's remark that the Bennett Amendment was intended to permit differences of treatment in industrial benefit plans, including earlier retirement options for women, does not support Water and Power in the instant case. Viewed in context, Senator Humphrey never intended his remarks to be construed as permitting differences in retirement plans that discriminated *against* women. To the contrary, Senator Humphrey believed that since Title VII was designed to improve the employment status of women, it should not be used to undermine existing practices designed to achieve that same result. In any event, when Congress

amended Title VII in 1972 it explicitly adopted existing case law which included two decisions invalidating differential retirement ages under Title VII.

Respondents are entitled to restitution of the contributions they were illegally required to make to Water and Power's Plan. This remedy is in accord with the purpose of Title VII to make persons whole for injuries suffered by reason of unlawful employment discrimination. Neither a good-faith defense nor the doctrine of sovereign immunity contained in the Eleventh Amendment can defeat Respondents' right to a refund of these contributions.

ARGUMENT.

THE MORTALITY TABLES USED BY WATER AND POWER TO DETERMINE EMPLOYEE CONTRIBUTIONS TO ITS PENSION PLAN WERE EXPLICITLY SEX-BASED AND DISCRIMINATED AGAINST WOMEN IN VIOLATION OF TITLE VII.

Sections 703(a)(1) and (a)(2) of Title VII provide:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ." (42 U.S.C. §§2000e-2(a)(1), (2).)

The Court, in a consistent line of Title VII cases, has set forth two tests for establishing a *prima facie* case of employment discrimination:

(1) Is the classification discriminatory on its face? *Dothard v. Rawlinson,* ..... U.S. ....., 97 S. Ct. 2720 (1977); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S. Ct. 496 (1971); *or,* if it is not,

(2) Is the classification discriminatory in its impact? *Nashville Gas Co. v. Satty,* ..... U.S. ....., ... U.S.L.W. ..... (decided December 6, 1977); *Dothard v. Rawlinson, supra.*

A. Water and Power's Pension Plan Discriminated Against Women on Its Face.

Water and Power, until January 1, 1975, used mortality tables based wholly and explicitly on sex to determine employee contributions to its Pension Plan. The tables simply divided employees into two groups—male and female. Based on this classification, Water and Power required women to contribute nearly 15% more to the Plan than similarly situated men in order to receive the same monthly benefits. For example, Marie Manhart and Frances Nouse, two retired employees, contributed over $5,000 and $6,000 more than their male counterparts, respectively, during their employment at Water and Power (R. 176).[4]

Water and Power's contention that its tables were not really based on sex, but rather on longevity, is a transparent attempt to avoid the fact that it has used an explicitly sex-based classification in violation of Section 703(a). Thus, other more relevant factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history, were not used in determining contribution rates. The Court of Appeals recognized this obvious contradiction and rested its decision on the fact that Water and Power's classification scheme was explicitly sex-based:

---

[4]During their employment with Water and Power, Manhart and Nouse contributed $17,303.75 and $19,323.24, respectively, to its Plan. Their male counterparts contributed $12,229.61 and $13,073.98 for a difference of $5,074.14 and $6,249.26 (R. 176). The record also reflects that Thelma Clark contributed $4,822.69 more than her male counterpart; Geraldine Green $5,837.87 more than her counterpart; Joan Roberts $5,396.04 more than her counterpart; and Mary M. Sullivan $5,963.72 more than her counterpart (R. 176).

> "A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d at 593.

The Court has considered explicitly sex-based classifications in only two Title VII cases, *Dothard v. Rawlinson, supra,* and *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971). *Dothard* involved various regulations of the Alabama Board of Corrections, one of which prohibited the assignment of women correctional counselors to "contact positions" in maximum security institutions, *i.e.,* positions requiring continual close physical proximity to inmates. (The other regulations at issue in *Dothard* are discussed *infra.*) In *Phillips,* a private employer refused to accept employment applications from women with pre-school age children, although it accepted applications from similarly situated men.[5]

In both *Dothard* and *Phillips,* the Court, after exposing the classification schemes as sex-based, placed the burden on the employer to justify its use of gender

[5]The same Title VII principles apply to both public and private employers. *Dothard v. Rawlinson,* .... U.S. at ...., 97 S.Ct. at 2728, n. 14.

criteria under the BFOQ defense. Likewise, because Water and Power's classification scheme was sex-based, it too must justify its practice under Section 703(e). This it has not done and cannot do.

The BFOQ defense is found in Section 703(e) of Title VII. It provides that:

> "It shall not be an unlawful employment practice for an employer to hire and employ an employee on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

A comparison of Section 703(e) with Section 703(a) reveals that the scope of the BFOQ defense does not parallel the scope of unlawful conduct. Indeed, Section 703(a) defines prohibited conduct as broadly as one can imagine. It makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individual*" on the basis of sex or "*to limit, segregate or classify*" employees in any way which would deprive a person of equal employment opportunities on the basis of sex.

Section 703(e), on the other hand, is very narrowly drafted. It permits the BFOQ defense only when an employer "hire[s]" or "employ[s]" an individual because of his or her sex. The Court in *Dothard* recognized the inherent limitation of the BFOQ defense and adopted "the virtually uniform view of the federal

courts that Section 703(e) provides only the narrowest of exceptions to the general rule requiring equality in employment opportunities." .... U.S. at ...., 97 S.Ct. at 2728. It stated:

> "We are persuaded—by the restrictive language of §703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the BFOQ exception was, in fact, meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." (Footnote omitted.) .... U.S. at ...., 97 S.Ct. at 2727.

The *Dothard* Court quoted with approval the formulation of the BFOQ defense set forth in *Diaz v. Pan American World Airways,* 442 F.2d 385 (5th Cir. 1971). This formulation, *which extends only to hiring practices,* admonishes that:

> "[D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) 442 F.2d at 388.

Water and Power's use of sex-segregated tables to determine employee contributions to its Pension Plan does not impact on hiring practices nor are the tables even remotely related to the essence of Water and Power's business operation, *i.e.,* to provide water and power to residents of the City of Los Angeles. In any event, as the Court of Appeals stated:

> "Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program, there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and pension administrators to predict costs and benefits, *but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex.*" (Emphasis added.) 553 F.2d at 587.

The Court of Appeals suggested as an alternative mortality tables that reflect a variety of factors affecting longevity. Since it is axiomatic that the more comprehensive the data, the more reliable the prediction, Water and Power cannot complain that the fiscal integrity of its Plan would be threatened. Mortality tables based on other criteria such as smoking and drinking habits, normality of weight, prior medical history and family longevity history, would more accurately predict longevity and enable Water and Power to more intelligently fund its pension system.

A second alternative available to Water and Power, if the multi-factor table proves administratively unfeasible, is the sex-neutral table. This table pools the risk of longevity associated with sex in the same manner as Water and Power's tables now pool the risk of longevity associated with factors other than sex. For example, although it can be predicted that as a class non-smokers outlive smokers, the risk of longevity associated with non-smokers is distributed over all members of the covered group. Indeed, this is the very nature of group insurance. As stated in *World Trends In Life Insurance*:

> "Group schemes reduce the importance of mortality tables in the calculation of premiums. For large schemes containing thousands of people a

very approximate knowledge of ages is adequate. It can suffice to know that the group is not noticeably ageing and that there are a reasonable number of new entrants in the lower age groups. As the size of the group increases the previous claims experience becomes more important than mortality assumptions based on mortality tables." S. Wynn, *World Trends In Life Insurance* at pages 42-43 (John Wiley & Sons 1975).[6]

The issue in the instant case, therefore, is what risks Water and Power ought to be required to pool in order to determine longevity. The resolution of this issue, however, cannot be determined solely by reference to actuarial facts. *Certain classifications which may be feasible from an actuarial standpoint may be barred for reasons of social policy.* Thus, as pointed out on page 11 of the Amicus Brief of the Society of Actuaries and the American Academy of Actuaries, "black persons exhibit shorter longevity than white persons, but they are not charged a lower amount when they purchase annuities or a higher amount when they purchase life insurance."[7] When Congress enacted Title VII, it declared that "persons of like qualifications be given

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[6]Mortality tables and claims experience are not the only elements used to determine the fiscal soundness of a pension plan. Thus, the assumed rate of return on investments is equally important in computing the present value of the fund. It is axiomatic that an increase in mortality rates can be offset by a like increase in the assumed rate of interest. C. W. Jordan, *Life Contingencies* at page 57 (Transactions of the Society of Actuaries 1975). Thus, an increase of 15% in mortality rates can be compensated for by a 15% increase above the present assumed rate of return.

[7]The "unfairness and questionable constitutionality" of this kind of classification was stated in *Craig v. Boren,* 427 U.S. 190, 208, n. 22, 97 S.Ct. 451, 463, where the Court commented on the statistical relationship between alcohol abuse and certain racial and ethnic minorities.

employment opportunities irrespective of their sex." *Phillips v. Martin Marietta Corp.,* 400 U.S. at 544, 91 S. Ct. at 497-498. By making this determination, it foreclosed the actuarial option of using sex as an indicator of longevity if that would deny a woman the same employment benefits as a similarly situated man because of her sex.

Longevity is not the only characteristic associated with sex. For example, automobile insurance statistics show that women are safer drivers than men. See, *e.g.,* Bureau of Economics, Federal Trade Commission, Price Variability in the Automobile Insurance Market 255 (Dep't of Transportation, Automobile Insurance and Compensation Study, 1970). However, as one commentator stated:

"[A] trucking company could not refuse to hire men on the theory that they are, on the whole, less safe drivers. A ban on sex discrimination must mean that attributes of one sex cannot be used to burden any single employee who may not share that attribute. Since some men are safe drivers, and some women are not, this type of policy constitutes explicit sex discrimination. The employer is not, strictly speaking, hiring only safe drivers; he is hiring only women safe drivers." Note Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev., 1109, 1174.

The inequity of using sex-segregated tables to determine longevity is highlighted by the fact that nearly five out of six women share common death ages with their male counterparts:

"The great majority of men and women—84 per cent—share common death ages. That is, for every

> woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 per cent are women who live longer than the majority and men who live shorter. As a result, each woman is penalized because a few women live longer and each man benefits because a few men die earlier." *Henderson v. Oregon,* 405 F. Supp. 1271, 1277, n.5, appeal docketed, No. 76-1706 (9th Cir., March 30, 1976).[8]

What Water and Power has done, therefore, is to spread the risk of longevity associated with every sixth woman among a class comprised solely of women, 84% of whom will die at the same age as their male counterparts. Thus, out of a class of 1,000 males and 1,000 similarly situated females, 840 men and women will die at the same age. Nevertheless, these 840 women are penalized by the 160 women who are blessed with longevity and, equally important, these 840 men will receive a windfall.[9] Water and Power's

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[8]There is no evidence before the Court concerning the common death ages of men and women. However, two courts, a Federal District Court in Oregon and the Indiana State Supreme Court, respectively found that 84% and 82.9% of men and women live to the same age. *Henderson v. Oregon, supra,* and *Reilly v. Robertson,* 360 N.E.2d 171 (1977). An explanation of this overlap in death ages appears in G. Martin, "Gender Discrimination in Pension Plans," Journal of Risk and Insurance, Vol. XLIII, No. 2, at pages 203-214 (June 1976). Respondents respectfully request that the Court take judicial notice of this fact pursuant to Rule 201 of the Federal Rules of Evidence.

[9]The suggestion of TIAA-CREF on page 25, note ** of its Amicus Brief that pairing male and female death ages "establishes nothing more than any two groups in different risk classifications may be 'overlapped'" is not helpful in the instant case. The simple fact, not disputed by TIAA-CREF, is that 84% of men and women share common death ages. Since the present action concerns the use of sex-segregated tables to determine the life span of groups of individuals, any other pairing, *e.g.*, according to the order in which each person

position is that since it is impossible to predict when a particular individual will die, it will penalize only women because as a class they live longer than men.

The feasibility of sex-neutral tables has been aptly demonstrated by Water and Power's own experience during the nearly three years it has operated under such tables. Thus, there is nothing in the record, nor has Water and Power sought to augment the record, to support the doomsday predictions of financial ruin contained in its Brief. In fact, Water and Power's pension system is running smoothly without the use of sex-segregated tables and it will continue to do so regardless of the Court's decision. Effective on and after January 1, 1975, the California Legislature in Government Code, Section 7500 made it unlawful for a municipal pension and retirement system to require "employees of one sex to pay greater contributions than those of another sex who are the same age."[10]

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dies, is of no value. That a similar overlap of death ages occurs between a group of women aged 65 and a group of women aged 60 also is inapposite. The Age Discrimination Act of 1967 specifically excludes retirement plans (29 U.S.C. §623(h)(2)).

[10]The Amicus Brief of the Society of Actuaries and the American Academy of Actuaries refutes the claim of other amici that a decision affirming the Court of Appeals would cause financial problems for other pension plans across the nation. At page 18, it states that:

> "Most defined benefit plans are noncontributory, but a substantial minority requires employee contributions. Employee contributions are almost always—unlike the plan in the case at bar—unrelated to age or sex. To the extent that employee contributions are related to age or sex, they are found in plans adopted by governmental bodies and not by private institutions. . . .
>
> "Since defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare, there would not be a widespread effect if equal employee contribution rates were to be required in the case at bar."

Water and Power has not attacked this statute in Court.

In sum, the BFOQ defense is not available to Water and Power in the case at bench. Under Title VII principles, its use of sex-segregated tables was unlawful.

The Court in *General Electric Co. v. Gilbert, supra,* suggested, because of the similarities between the language used by Congress in Title VII and in various decisions construing the Equal Protection Clause of the Fourteenth Amendment, "that the latter are a useful starting point in interpreting the former." 429 U.S. at 133, 97 S. Ct. at 407.[11] This comparison was

[11]The argument advanced by Water and Power that Congress' enforcement powers under Section 5 of the Fourteenth Amendment may not go beyond judicial standards construing the Amendment was disposed of in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717 (1966). In upholding Section 4(e) of the Voting Rights Act of 1965, which invalidated literacy requirements affecting the right of certain Puerto Ricans to vote, the Court stated:

> "The Attorney General of the State of New York argues that an exercise of congressional power under §5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that §4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by §4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of §5 supports such a construction." (Footnote omitted.) 384 U.S. at 648, 86 S.Ct. at 1722.

The Court went on to hold that under Section 5 Congress has the power to pass all laws appropriate to enforce the prohibitions of the Amendment. Any other rule, the Court said, "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." (Footnote omitted.) *Id.* See also *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. at 260 (1970). Title VII is appropriate to enforce the anti-discrimination mandate of the Fourteenth

helpful in *Gilbert* for a significant reason that is inapplicable to the instant case. Since the classification in *Gilbert* did not discriminate against women on its face, the Court first had to determine the threshold question of whether General Electric's policy was discriminatory in its impact. Thus, it turned to its earlier decision in *Geduldig v. Aiello,* 417 U.S. 484, 94 S. Ct. at 2485 (1974), where it had considered an identical claim under the Fourteenth Amendment, to ascertain "what the concept of discrimination has traditionally meant." 429 U.S. at 145, 97 S. Ct. at 412.[12] However, the Court was very careful to point out that "there is no necessary inference that Congress, in choosing this language [of Section 703(a)(1)], intended to incorporate into Title VII the concepts of discrimination which evolved from Court decisions construing the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 133, 97 S. Ct. at 407.

The instant case, unlike *Gilbert,* concerns explicit sex discrimination rather than disparate impact. The fact that Water and Power's use of sex-segregated tables discriminates against women cannot be disputed. The real controversy is whether Water and Power can justify

Amendment in the employment arena. Because of the multiplicity of employment practices which, although facially neutral, discriminate against women, see, *e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849 (1971), an interpretation of Title VII which requires a showing of discriminatory intent would render it virtually meaningless.

[12]The Court in *Gilbert,* quoting from *Geduldig,* agreed that "[t]he program divides potential recipients into two groups—pregnant women and non-pregnant persons." 429 U.S. at 135, 97 S.Ct. at 407. The Court concluded that "the quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability benefits plan *was not in itself discrimination based on sex.*" (Emphasis added.) *Id.*

its use of these tables under the BFOQ defense. In short, the rationale used to connect *Gilbert* with *Geduldig* cannot be used to connect the instant case with cases decided under the Fourteenth Amendment.

A Fourteenth Amendment approach also is inappropriate for another reason: The judicial standard of scrutiny under the Equal Protection Clause is closer for blacks than for women. Compare *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817 (1967) with *Craig v. Boren, supra. Title VII, however, except for the BFOQ exception, does not distinguish between these two protected groups.* Thus, under a Fourteenth Amendment analysis, women would be placed in the anomalous position of receiving less protection under Title VII than blacks, a result clearly not contemplated by Congress when it enacted Title VII.

For these reasons, Respondents submit that resort to the Fourteenth Amendment would not be helpful in the instant case. Nevertheless, because Water and Power's practice was so arbitrarily discriminatory and without justification, it cannot be validated under any test, constitutional or statutory. With this caveat, Respondents submit the following Fourteenth Amendment analysis as an *additional rationale* for striking down Water and Power's practice as discriminatory.

Water and Power relied solely on sex, as an inaccurate substitute for length of life, to determine employee pension plan contributions and ignored other more relevant factors affecting longevity. Some of these were mentioned by the Court of Appeals, *i.e.,* smoking and drinking habits, normality of weight, prior medical history and family longevity history. Viewed in this light the instant case presents an equal protection question considered in a long line of Fourteenth Amendment cases invalidating statutes which employed gender as an inaccurate substitute for other and more relevant bases of classification. *Califano v. Goldfarb,* 430 U.S. 198, 97 S. Ct. 1021 (1977); *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451 (1976); *Weinberger v. Wisenfeld,* 420 U.S. 636, 95 S. Ct. 1225 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764 (1973); and *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971).

In *Reed,* the Court considered a statute providing that where two persons were otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female applicant. The assumption underlying this preference was that men as a rule are more conversant with business affairs than women and therefore, all other factors being equal, would make better administrators. The statutory objective was to eliminate contests in order to reduce the workload on probate courts and minimize intra-family conflict.

The Court in *Reed* recognized that the state's interest in achieving administrative efficiency "is not without some legitimacy." Nevertheless, it concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intra-family controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." 404 U.S. at 76-77, 92 S. Ct. at 254.

Weinberger and *Califano* involved social security statutes providing benefits to surviving widows with children and to widows, respectively, but not to surviving widowers with children nor to widowers who received less than one-half of their support from their deceased wives. The statute in *Frontiero* granted spousal benefits to servicemen but not to servicewomen unless they provided more than one-half of their husband's support.

These statutes each rested on the notion that men were more likely than women to be the primary supporters of their spouses and/or their children. Although the Court in *Weinberger* found that this assumption "is not entirely without empirical support," 420 U.S. at 642, 95 S. Ct. at 1230, it nevertheless struck down both statutory schemes. "Benefits," the Court held, "must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." *Id.* at 647, 95 S. Ct. at 1238. The statistically valid fact that more men than women are family breadwinners did not provide this justification.

The statutes at issue in *Craig* rested on a different assumption than in the above cases. At issue was an Oklahoma scheme prohibiting the sale of "non-intoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. The legislative assumption underlying this scheme was that males were more prone to "driving under the influence" and "drunkenness" than females. 429 U.S. at 200, 97 S. Ct. at 458. Although Oklahoma presented a flood of statistics to support its disparate treatment of men and women, the Court held the statutes unconstitutional. Its decision rested on (1) the normative philosophy of the equal protection clause that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of these objectives," 429 U.S. at 197, 97 S. Ct. at 457, and (2) the "weak congruence between gender and the characteristic or trait that gender purported to represent." 429 U.S. at 199, 97 S. Ct. at 458.

The instant case, like the cases cited above, presents a situation where, as a matter of administrative convenience and bureaucratic momentum, an explicitly sex-based classification was used in place of other more accurate and relevant factors for determining longevity. Similar to applying sexual stereotypes concerning female dependency or overbroad generalizations about male drinking and driving habits, Water and Power fell back on the broad assumption that women live longer than men. Admittedly, this assumption "is not entirely without empirical support." *Weinberger v. Wisenfeld,* 420 U.S. at 647, 95 S. Ct. at 1233. However, because over 80% of men and women share common death ages, the congruence between an individual's life span and sex is weak. Moreover, Water and Power's use of this solely sex-based criterion to charge female employees more for pension benefits equal to those of male employees neither serves "important governmental objectives" nor is "substantially related to the achievement of those objectives." *Id.* at 197, 97 S. Ct. at 457.

The primary purpose of Water and Power's Plan is to provide employees with a monthly income typically used to satisfy short-term daily needs arising during retirement. Although the Plan provides the same benefits to male and female retirees, it charged female employees approximately 15% more for these benefits

than male employees. Because this cost differential could be used by males to purchase additional retirement insurance, they were better protected against the vicissitudes of retired life than females. The magnitude of retirees' needs, however, does not correspond in any meaningful way with one sex or the other. See *Califano v. Goldfarb, supra.*

A second purpose of Water and Power's Plan is to provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. Thus, the plan does not have its first effect when a participant becomes eligible to retire, but it begins to operate when he or she first accepts employment with Water and Power. The possibility that qualified male job applicants were encouraged to accept employment with, or dissuaded from leaving, Water and Power because of the differential treatment afforded them by its Pension Plan, at the very least, is speculative and remote.

Water and Power's Plan differs significantly from the disability plan considered by the Court in *General Electric Co. v. Gilbert.* Unlike Water and Power's Plan, the program in *Gilbert* was not discriminatory on its face, but merely excluded from coverage disabilities associated with pregnancy which is "an objectively identifiable physical condition with unique characteristics." 429 U.S. at 134, 97 S. Ct. at 407. Thus, the Court emphasized that:

> " 'The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.' [*Geduldig v. Aiello,*] 417 U.S. at 496-497, n. 20." 429 U.S. at 135, 97 S. Ct. at 407.

Water and Power's Plan also divides potential recipients into two groups—men and women. This classification, however, is solely sex-based. The first group is exclusively male and the second group is exclusively female. This is a far cry from the disability plan in *Gilbert* and it is just the kind of sex-based classification that the Court struck down as unconstitutional in *Califano v. Goldfarb, Craig v. Boren, Weinberger v. Wisenfeld,* and *Frontiero v. Richardson.* See *General Electric Co. v. Gilbert,* 429 U.S. at 134, 97 S. Ct. at 407.

B. Water and Power's Pension Plan Imposed on Women a Substantial Burden That Men Were Not Required to Bear.

A *prima facie* violation of Title VII can be established with respect to a classification which is facially neutral if the classification significantly diminishes the employment opportunities of one sex or another, *i.e.,* if the employment policy has a "gender-based effect." *Gilbert v. General Electric Co.,* 429 U.S. at 137, 97 S.Ct. at 409. In *Nashville Gas Co. v. Satty,* .... U.S. ...., ... U.S.L.W. .... (decided December 6, 1977), the Court held that a gender-based effect could be shown if a facially neutral classification scheme burdens one sex and not the other. Slip Opinion at page 5. Thus, even if Water and Power's classification scheme was based on longevity (which it was not), that fact standing alone does not insulate it from Title VII liability. For, as we shall demonstrate, Water and Pow-

er's use of sex-segregated tables significantly burdened its female employees by requiring them to pay nearly 15% more to the Plan than their male counterparts in order to receive the same monthly retirement benefits.

Before discussing the disparate impact of Water and Power's tables on women, two principles must be observed: First, a *prima facie* violation of Title VII can be established "even absent proof of intent" if the *effect* of the practice is to discriminate on the basis of sex or other impermissible classifications. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853 (1971). Second, under Title VII, as contrasted with the Equal Protection Clauses of the Fifth and Fourteenth Amendments, judicial inquiry in disparate impact cases "involves a more probing judicial review of, and less deference to, seemingly reasonable acts of administrators and executives than is appropriate under the Constitution. . . ." *Washington v. Davis*, 426 U.S. 229, 247, 96 S.Ct. 2040, 2051 (1976).

In *Satty*, the issue was whether an employer could deny accumulated seniority and sick leave benefits to pregnant women on leave. The Court held that the question presented with respect to sick leave benefits was indistinguishable from the question decided in *Gilbert*. It found that the denial of these benefits to women was merely a refusal to extend to them a benefit that men cannot and do not receive. However, with respect to accumulated seniority, the Court held that the employer "imposed on women a substantial burden that men need not suffer." Slip Opinion at page 5.

Likewise, in the instant case, Water and Power, by charging women 15% more than men to receive

the same monthly pension benefits, diminished the ability of working women to provide for themselves and their families. For example, as stated above, Marie Manhart and Frances Nouse were forced to contribute to Water and Power's Plan over $5,000 and $6,000, respectively, more than their male counterparts. This loss of income was especially damaging to women like Carolyn Mayshack who was the sole provider for her two young children (R. 61).

The Court adopted an alternate approach in *Dothard v. Rawlinson, supra*. The issue in *Dothard*, in addition to that discussed above, was whether the Alabama Board of Corrections could set minimum height and weight requirements for prison guards which excluded 41.13% of the female population and less than 1% of the male population from employment consideration. The Court held the standards involved finding that "to establish a *prima facie* case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." .... U.S. at ...., 97 S.Ct. at 2726.

It cannot be disputed that Water and Power's use of sex-segregated tables had a "significantly discriminatory" impact on women. Because women as a class live longer than men, each woman was required by Water and Power to contribute nearly 15% more to its Pension Plan than her male counterpart. It does not require exceptional prescience, however, to know that not *all* women outlive *all* men. In fact, as stated above, "the great majority of men and women—84%—share common death ages." *Henderson v. Oregon, supra* at 1277.

Water and Power's use of sex-segregated tables had a greater discriminatory effect on women than the height and weight regulations held invalid in *Dothard*. Thus, in *Dothard*, the facially neutral classifications used for hiring prison guards impacted on less than one-half of the female population. Water and Power's practice, on the other hand, penalized nearly five out of six women and, in addition, provided a windfall to a like number of men.

There is no available data showing that among *working people* females live longer than men. The difficulty of defining the relevant class and compiling accurate statistics was addressed by Justice Arterburn concurring in *Reilly v. Robinson, supra:*

> "[T]here is no showing or evidence presented by the Appellant [Retirement] Board that women teachers live longer than men teachers. There is no statistical evidence or mortality table presented that shows that in the teaching profession females have a longer life span than males.
>
> "I grant that when the population as a whole is considered statistics indicate women on the average live longer lives than men. *However, I ascribe that result to the common knowledge that traditionally men engage in more hazardous or stressful occupations (such as mining, steel construction) while many women are engaged in household activities. To me such a fact colors the mortality tables comparing men and women.*
>
> "We are dealing in this case solely with the teaching profession. I'm inclined to believe that the stresses, strains and hazards of that profession apply alike to the male and female teacher. Until there is evidence to the contrary I must conclude the mortality rate is the same." (Emphasis added.) 360 F.2d at 191.[18]

Once a *prima facie* case of disparate impact is established, "[t]he touchstone is business necessity." *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. at 853. In other words, the discriminatory practice must be "necessary to the safe and efficient operation of the business." *Robinson v. Lorillard*, 444 F.2d 791, 798 (5th Cir. 1971), *cert. denied* 404 U.S. 1006 (1971). See *Dothard v. Rawlinson, supra,* .... U.S. at ...., 97 S.Ct. at 2728, n. 14.

The Fourth Circuit in *Robinson* set forth a threefold test for determining when to apply the business necessity exception: (1) the business purpose of the challenged practice must be sufficiently compelling to override any discriminatory impact; (2) the challenged practice must effectively carry out the business purpose it is alleged to serve; and (3) there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser discriminatory impact. 444 F.2d at 798.

Water and Power's practice fails the *Robinson* test on all three counts. As stated above, not only does Water and Power's use of sex-segregated tables serve no business purpose, but *alternative methods of predicting longevity which are not based solely on sex* are available. These alternatives were discussed above.

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[18]Justice Arterburn's belief is shared by at least one commentator. In Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B. U. L. Rev. 624, n. 2 (1973), the author suggests that because women traditionally have not been employed in stressful occupations, and because they are now more frequently filling these higher-paying positions, the longevity gap will narrow.

The first is the sex-neutral table which pools the risk of longevity associated with sex in the same manner as other longevity risks are pooled. If Water and Power still believes that sex is the best identifiable predictor of an individual's life span, it would still be entitled to use data based on the male-female mix of Plan members to project funding requirements. However, contribution rates would be the same for both sexes. The sex-neutral table is suggested by various commentators as the best means of complying with Title VII's anti-discrimination mandate. See, *e.g.*, Note, Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, *supra* at page 1173.

The second alternative is for Water and Power to use a multi-factor table. As stated above, this table is based on a variety of factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history. This method, which was mentioned by the Court of Appeals, not only has a markedly less discriminatory impact on women, but more accurately predicts longevity than sex-segregated tables. Although the initial switch to the multi-factor table may be inconvenient, Title VII, like the Constitution, should recognize "higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972).

TIAA-CREF, at pages 26-27 of its *Amicus Brief*, claims that if the Court requires equal contribution rates, men will be forced to subsidize women and will, therefore, opt out of the Plan in order to buy benefits at a lower cost. This in turn, it argues, will

result in higher pension costs for those persons that remain in the Plan. TIAA-CREF's scenario, however, is inapposite to the instant case for several reasons. The most obvious reason is that Water and Power's Plan is mandatory, that is, participants are not permitted to opt out of the Plan. Moreover, it is misleading to state that under sex-neutral tables men subsidize women. In fact, as we have seen, nearly five out of six women share common death ages with their male counterparts. Thus, rather than charging all women for the longevity associated with one woman in six, a requirement of equal contributions would spread this risk over the entire group. This, of course, is no different than the present situation where, for example, non-smokers are subsidizing smokers and it typifies the manner in which group insurance plans work.

Nothing in the Court's decision in *Satty* or *Gilbert* compels acceptance of Water and Power's practice in the instant case. In the pregnancy cases, the employer merely refused to extend to women a benefit that men could not and did not receive, *i.e.*, sick leave benefits for pregnancy in *Satty* and disability benefits for pregnancy in *Gilbert*. In the case at bench, there exists an entirely different situation. *Longevity, unlike pregnancy, is a characteristic by no means unique to women.* Thus, while some men live longer than some women (and some men are better drivers than some women), no man can become pregnant.

WATER AND POWER'S USE OF SEX-SEGREGATED TABLES VIOLATES TITLE VII AS INTERPRETED BOTH BY THE EEOC AND THE DEPARTMENT OF LABOR.

A. EEOC Guidelines Forbid Employers From Requiring Female Employees to Pay More for Pension Benefits Than Similarly Situated Male Employees.

Congress created the EEOC to enforce the anti-discrimination mandate of Title VII (42 U.S.C. §2000 e-4). Although EEOC rulings, interpretations and opinions are "not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944), quoted in *Gilbert v. General Electric Co., supra,* 429 U.S. at 141-142, 97 S. Ct. at 411, and are entitled to deference, *Griggs v. Duke Power Co.*, 401 U.S. at 433-434, 91 S. Ct. at 854-855.

EEOC guidelines provide that "[i]t shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits." (29 CFR §1604.9(b).) *Moreover, the guidelines categorically assert that "[i]t shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex."* (29 CFR §1604.9(f).) The guidelines further prohibit as "a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater

with respect to one sex than the other." (29 CFR §1604.9(e).)

The EEOC has applied its guideline standards to a case identical to the instant case. In rejecting the argument that equalizing monthly payments would discriminate against men, who as a class would receive less because they tend to die sooner, and in favor of women, who would receive more because they generally die later, the EEOC stated:

> ". . . The Commission has held that sex-based actuarial tables cannot be used by an employer to justify paying higher benefits to males than to females where contributions by members of each sex are the same. Commission Decision Nos. [sic] 7[4]-118. An inescapable corollary to this principle is that *an employer may not require a higher contribution from members of one sex where benefits to members of both sexes are the same.*
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> ". . . Title VII is not, however, concerned with whether benefits to each sex group *as a class* are equal—Title VII looks to *individual* benefits. *For the individual, the 'benefit' provided by a retirement plan is not some statistically determined 'average total payment' received by members of the same sex, it is 'a pension of X dollars per month.'* It is *this* benefit that Title VII requires be the same for both males and females.
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> *"The EEOC Guideline relating to retirement plans is based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted*

to influence the terms and conditions of an individual's employment, even where the generalizations are statistically valid. It violates Title VII for Respondent to require its female employees to pay more than similarly situated male employees for the same monthly pension." EEOC Decision No. 75-147, CCH EEOC Decisions ¶6447 at 4191 (Employment Practices Guide, 1975). (Emphasis added.)[14]

As with the seniority guideline at issue in *Satty*, the EEOC's 1972 position on pension benefits "is fully consistent with past interpretations of Title VII by the EEOC." *Nashville Gas Co. v. Satty*, Slip Opinion at page 6. Thus, it has never issued conflicting interpretations on pension benefits as it did regarding disability benefits for pregnancy. Rather, the EEOC's position on pension and retirement plans has become more detailed over time reflecting the agency's thought and experience.

The EEOC's first guidelines on sex discrimination, issued in 1965, were narrow in scope and specifically addressed only the most blatant forms of sex discrimination in employment (30 Fed. Reg. 14926-28 (Dec. 2, 1965)). In the following years, through court cases and employee charges of sex discrimination brought before it, the EEOC became increasingly aware of the variety of more subtle discriminatory practices in the area of fringe benefits. As a result, it moved toward enunciating a more detailed position on this issue.

[14]EEOC Decision No. 74-118, cited by the EEOC in Decision No. 75-147, held invalid a plan which required equal male and female contributions but which paid fewer benefits to females than to males.

In 1968, the EEOC first published guidelines directed at sex-based discrimination in retirement plans. The new guidelines specifically provide that a difference in optional or compulsory retirement ages based on sex violates Title VII. The guidelines also put employers on notice that the EEOC would rule on the validity of other sex-based differences in retirement plans, such as differences in survivors' benefits, on a case by case basis (33 Fed. Reg. 3344 (Feb. 24, 1968)).

The EEOC issued its present guidelines on sex discrimination in 1972 based on seven years of experience. The soundness of these guidelines, and the weight to which they are entitled in determining legislative intent, should not be diminished simply becasue they are the product of thoughtful and conscientious deliberation. Indeed, the EEOC's decision to gradually detail its position is to be expected in an area as complex as employment discrimination. The EEOC should be commended, not criticized, for its cautious approach.[15]

In addition to its guidelines, the EEOC has issued numerous decisions invalidating both retirement age

[15]The gradual perfection of EEOC guidelines is paralleled by Congress' own experience in the area of employment discrimination. See Senate Committee Report on the Equal Employment Opportunity Act of 1972:

> "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false. [¶] Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . [¶] In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (Senate Report No. 92-415, 92d Cong., 1st Sess., p. 5.)

and benefit differentials based on sex. The EEOC's earliest position is detailed in *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775 (3rd Cir. 1969). In that case, on January 26, 1966, the EEOC found reasonable cause to believe that a pension plan discriminated against male employees in violation of Title VII. The plan provided that "a male employee taking early retirement at age 60, after 30 years service, would receive substantially lower pension benefits than a female employee retiring at the same age, with the same length of service, assuming the same average salary." 409 F.2d at 775. The EEOC also found that the plan discriminated against women by forcing them to retire five years earlier than men. 409 F.2d at 775, at note 8.

A steady stream of other EEOC decisions likewise have found that sex-based differentials in both retirement benefits and age violated Title VII. See, *e.g.*, Case No. YNY 9-034, CCH EEOC Decisions ¶6050 (6-16-69) (age and benefits for survivors); Case No. YNY 9-027, 1 FEP Cases 921 (7-3-69) (age); Decision No. 70-45, CCH EEOC Decisions ¶6041, 2 FEP Cases 166 (7-18-69) (age); Decision No. 70-75, CCH EEOC Decisions ¶6049, 2 FEP Cases 684 (4-20-70) (age); Decision No. 71-562, CCH EEOC Decisions ¶6184, 3 FEP Cases 233 (12-4-70) (age and benefits); Decision No. 71-1102, CCH EEOC Decisions ¶6200, 3 FEP Cases 271 (12-31-70) (age); Decision No. 71-1580, 3 FEP Cases 812 (4-8-71) (age and benefits for survivors); Decision No. 72-0702, CCH EEOC Decisions ¶6320, 4 FEP Cases 316 (12-27-71) (age); Decision No. 72-1919, CCH EEOC Decisions ¶6370, 4 FEP Cases 1163 (6-6-72) (benefits); Decision No. 74-118, CCH EEOC Decisions ¶6431 (4-26-74) (benefits); Decision No. 75-020, 11 FEP Cases 1496 (9-4-74) (benefits); Decision No. 75-147, CCH EEOC Decisions ¶6447, 11 FEP Cases 1486 (1-13-75) (age and benefits).

TIAA-CREF at page 42 of its Amicus Brief quotes from a 1966 EEOC opinion letter which is contrary to the position just described. This letter, however, was written during the formative years of EEOC's development and it should not now be used to undermine *guidelines* which are the product of seven years' experience. Needless to say, the 1966 letter, which is of no precedential value, is outside the mainstream of EEOC's unfolding position. (The letter is also contrary to the EEOC's earlier stated position in *Rosen v. Public Service Electric & Gas Co., supra.* See discussion above.) As the Court observed in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349, 73 S. Ct. 287, 290 (1953):

> "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."[16]

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[16]TIAA-CREF also points out at pages 41-42 of its Amicus Brief that the EEOC in 1965 agreed to apply relevant Labor Department interpretations under the Equal Pay Act to Title VII in order to harmonize the statutes. (29 CFR §1604.7(b)). However, TIAA-CREF omitted from its quotation of §1604.7(b) that the EEOC determined that only 29 CFR Parts 800.119 through 800.163 were, in fact, relevant. Part 800.116(d), on which TIAA-CREF relies, was not among the included sections.

B. Labor Department Interpretive Bulletins, Like EEOC Guidelines, Forbid Employers From Requiring Female Employees to Make Larger Pension Contributions Than Similarly Situated Male Employees.

Section 703(h) of Title VII (42 U.S.C. §2000e-2(h)), popularly known as the Bennett Amendment, permits an employer "to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if differentiation is authorized by the provisions of section 206(d) of Title 29." Section 206(d), among other things, permits discrimination based on "a differential based on any other factor other than sex."[17]

Water and Power and various amici have argued that the use of sex-segregated mortality tables is valid under the Bennett Amendment as based on a "factor other than sex," *i.e.*, longevity. As discussed earlier, however, "[s]ex is exactly what it is based on." Court of Appeals opinion, 553 F.2d at 588. If Water and Power's tables were based on longevity, they would

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[17]Section 6(d)(1) of the Equal Pay Act, 29 U.S.C. §206(d)(1), provides, in partinent part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex*. . . ." (Emphasis added.)

have reflected other more relevant factors such as smoking and drinking habits, normality of weight, prior medical history and family longevity history.

In interpreting Section 206(d), the Labor Department has never sanctioned the practice of requiring female employees to make larger pension plan contributions than their male counterparts. To the contrary, *it has always maintained that wage differentials based on employment cost comparisons must be made on an individual and not on a class basis.*

The Labor Department first addressed the use of sex-based wage differentials in a June 18, 1964 opinion letter issued by the Wage and Hour Administrator. As in the instant case, the employer was attempting to justify an eight cent hourly wage differential between its male and female employees based on data showing that pension benefits, hospitalization and medical insurance, turnover costs and rest period benefits cost eight cents more an hour for women than for men. (Three cents an hour was attributed to pension costs.) The Administrator, however, held that the "factor other than sex" exception could not be claimed where the employer had analyzed only some but not "all of the elements of employment costs" and declared the differential invalid. Wage and Hour Manual, 95:607 (BNA 1964).

This ruling was amplified by the Administrator in an Interpretive Bulletin issued February 11, 1966. The Bulletin provides that:

> "A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group

does not qualify as a differential based on any 'factor other than sex,' and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. *To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act.* Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility." 29 CFR §800.151, 31 Fed. Reg. 2657 (Feb. 11, 1966). (Emphasis added.)[18]

The Labor Department successfully implemented its policy in *Wirtz v. Midwest Mfg. Co.*, 18 WH Cases 556 (S.D. Ill., 1968, not otherwise reported), an Equal Pay Act suit brought by the Department to eliminate a ten cent an hour sex-based wage differential. Midwest

[18]Water and Power and various *amici* cite 29 CFR §800.-116(d) in support of their position. This Labor Department Bulletin permits an employer to provide unequal pension benefits for men and women if *employer* contributions to the plan are the same for both sexes. Not only does this Bulletin make no reference to *employee* contributions, but it is not included among the Labor Department regulations to which the EEOC initially agreed to defer, *i.e.*, 29 CFR Parts 800.119 through 800.163. See note 16, *supra*.

claimed that the differential was justified as a factor other than sex because of the additional cost required to provide its female employees with equal unemployment compensation, workers' compensation, and accident and health insurance. The Labor Department disagreed and, in a consent decree, repeated that a wage differential based on "claimed differences between the average cost of employing women employees *as a group* and the average cost of employing men employees *as a group* . . . does not qualify as a differential based on any 'other factor other than sex.'" (Emphasis in original.) 18 WH Cases at 560-561.

The instant case parallels *Midwest* and the case discussed in the Administrator's 1964 opinion letter. In each case, women received an effectively lower wage rate than their male counterparts because of the higher cost of providing them with pension and other benefits. The lower rate in *Midwest* and the opinion letter resulted from a wage differential based on these higher costs; in the instant case it resulted from the larger pension plan contributions women were required to make from their paychecks. Thus, a man and a woman performing the same work and each earning $1,000 a month contributed $49.70 and $57.10, respectively, to Water and Power's Plan.[19] The net result of the woman's larger contribution was that she earned 4.6 cents an hour less than her male counter-

[19]These figures conform to the 14.84% contribution rate differential that Water and Power admits existed until January 1, 1975. See Affidavits of Harry Church (R. 308) and Allan F. Larson (R. 311).

part, just as the woman in the opinion letter would have earned three cents an hour less because of pension costs.[20] For this reason, the Labor Department filed an *amicus curiae* brief in the Court of Appeals challenging Water and Power's discriminatory practice.

The legislatiave history underlying the Equal Pay Act supports the Labor Department's position that Water and Power's use of sex-segregated tables was unlawful and explodes the myth that the practice was exempted under Section 206(d)(1)(iv) as based on a factor other than sex.

The House Committee on Education and Labor, which reported out the Equal Pay Act, observed that the factor other than sex exemption was a catch-all for the kinds of distinctions available under subsections (d)(1)(i) through (iii), *i.e.*, distinctions based on seniority, merit or production. It commented:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours

[20]The fact that women may be paid the same salary as men does not make their wage rates equal under the Equal Pay Act when the actual take-home pay of women is less. With certain exceptions not applicable here, payments made to satisfy minimum wage requirements must be unconditional, *i.e.*, they must be "free and clear," and the employee must actually have use of the money. *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973). The same principle applies to the Equal Pay Act since its function also is to increase wages and improve living standards.

> of work lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded." House Report No. 309 to accompany H. R. 6060, May 20, 1963, Committee on Labor and Education, reprinted in 1963 *U.S. Code Cong. & Admin. News* 687, 689 (88th Cong., 1st Sess.).

There is nothing in this House Report to indicate that Section 206(d)(1) was intended to exempt any actuarially based employee program requiring less take-home pay for women, including pension programs, from the requirements of the Equal Pay Act. Exemption (iv), on which Water and Power relies, was designed only to include classifications like those already exempted.[21]

The Report of the Senate Committee on Labor and Public Welfare provides additional support for the principle that sex-based wage differentials must rest on an analysis of *all* employment costs. It states:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women *while* they do not encounter in the employment

[21]During debate on the Equal Pay Act, as pointed out at page 41 of the Amicus Brief of the American Council of Life Insurance ("ACLI"), the House rejected an amendment which would have allowed wage differentials based on the difference in cost associated with employing members of different sexes. As further explained by ACLI, the amendment was rejected by at least two members on the ground that the differentials already were permitted under exception (iv). However, ACLI failed to point out that to be exempted under this amendment an employer would have had to analyze all sex-related employment factors as the Labor Department has ruled. See, *e.g.*, remarks of Rep. Thompson, 109 *Cong. Rec.* 9207 (89th Cong. 1963). In any event, the House and Senate Committee Reports are more reliable indications of legislative intent than the random statements of a few members of the House.

of men. Some employers stated that the costs of their pension and welfare plans were higher for women because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits. . . .

"This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these are more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. . . .

> "*It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.* "(Emphasis added.) 109 Cong. Rec. 8915.[22]

In sum, Water and Power's contention that its use of sex-segregated tables was exempted from Title VII

[22]TIAA-CREF at page 34 of its Amicus Brief quoted only a selected portion of this part of the Senate Report and concluded that wage cost differentials based solely on greater pension costs for women were justified as based on a factor other than sex. As the entire Senate Report indicates, however, this is not the case.

because the tables were "based on any other factor other than sex" is totally without merit. Sex is exactly what Water and Power's tables were based on and there exists no compelling authority that Congress intended to insulate even customary actuarial practices that discriminate against women from the type of discrimination forbidden by Title VII.

THE RANDOLPH-HUMPHREY COLLOQUY DOES NOT SUPPORT WATER AND POWER'S CLAIM THAT THE BENNETT AMENDMENT WAS DESIGNED TO PERMIT DIFFERENTIAL TREATMENT OF MEN AND WOMEN UNDER RETIREMENT PLANS.

Despite the overwhelming legislative intent not to exclude sex-related wage differentials based on selected costs of employment under the Equal Pay Act, Water and Power relies on a colloquy between Senators Randolph and Humphrey as evidence of what Congress intended Section 206(d)(1) to encompass. In this exchange, which occurred during debate on the Civil Rights Act but after the *Bennett Amendment* was adopted, Senator Humphrey stated that the purpose of the Amendment would permit differences of treatment in industrial benefit plans, including earlier retirement options for women.[23]

[23]The entire Randolph-Humphrey exchange is as follows:

> SEN. RANDOLPH: Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.
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> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee

(This footnote is continued on next page)

Senator Humphrey's opinion on the Equal Pay Act clearly is not the law. That Act, which was intended to provide equal pay for equal work, has no application whatsoever to differential retirement ages based on sex. Title VII, on the other hand, does prohibit this type of discrimination. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971). As the Court of Appeals in the instant case stated:

> "It is questionable whether the Senator's statement, made during the debates on the incorporating statute [i.e., Title VII], would be significant when it erroneously interprets the incorporated statute [i.e., the Equal Pay Act]." 553 F.2d at 590.

The linchpin of the Randolph-Humphrey colloquy, which was that the Bennett Amendment permitted certain sex-based practices then prevailing under social security statutes, was recently rejected by the Court in *Califano v. Goldfarb, supra*. During the same Senate colloquy in which Senator Humphrey volunteered that the Bennett Amendment permitted early retirement options for women, he stated that the Amendment also permitted differential treatment under social security statutes as between widows and widowers. These, of course, were the very social security statutes held unconstitutional in *Califano* where the Court found that "women contributors to the social security system were

docs not. These differences in treatment as I recall, are of long standing. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

SEN. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it."

110 Cong. Rec. 13663-64, June 12, 1964.

disadvantaged as compared to similarly situated men." 430 U.S. at 208, 97 S. Ct. at 1027. Moreover, the social security system did not then, and does not now, use sex-based tables to determine employee contributions to, or benefits from, the Old-Age and Survivors Disability Insurance Trust Funds. 42 U.S.C. §§401(a), *et seq.*

Senator Humphrey's concern in his exchange with Senator Randolph was to preserve favorable treatment for women. Thus, in a letter to a Mr. Nicholls of the Northwestern Bell Telephone Company, Senator Humphrey stated that Title VII was, in part, designed to improve the employment status of women and that "it would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing pension, retirement, or benefit programs" favoring women. *Rosen v. Public Service Electric & Gas Co.*, 328 F. Supp. 454 (D.C.N.J. 1970), *remanded* in 477 F.2d .... (3rd Cir. 1973). It is reasonable to assume, therefore, that in his exchange with Senator Randolph, Senator Humphrey did not sanction discriminatory practices which, like the practice at issue in the instant case, were aimed against women.[24]

[24]This interpretation of Title VII is contrary to other indications of legislative intent. One commentator has stated that "Congress did not share Senator Humphrey's belief about the scope of the Act." M. Gold, "Equality of Opportunity in Retirement Funds," 9 Loyola L. Rev. 596, 602 (1976). Another has called Senator Humphrey's comment on the scope of Title VII "quite puzzling." Note, Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, *supra*, 84 Harv. L. Rev. at 1173. See also M. Bernstein and L. Williams, "Title VII and the Problems of Sex Classifications in Pension Programs," *supra*, 74 Col. L. Rev. at 1218, finding that Senator Humphrey's exchange with Senator Randolph "took place several hours after the [Bennett] Amendment was adopted, casting some doubt on its value as interpretive history."

Congress put to rest any question concerning the vitality of Senator Humphrey's remark when it amended Title VII in 1972 to extend its protection to state and local government employees. The Conference Report on the Amendments stated that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.[25] Case law in 1972 included two decisions striking down differential retirement ages under Title VII, the Seventh Circuit's opinion in *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939, and the District Court's opinion in *Rosen v. Public Service Electric & Gas Co., supra.*

Both the *Bartmess* and *Rosen* decisions expressly rejected the Randolph-Humphrey colloquy as a proper interpretation of the Bennett Amendment. Thus, the *Bartmess* Court, quoting the lower court in *Rosen*, found that "[t]he debates in Congress neither support nor refute" Senator Humphrey's statements. 444 F.2d at 1190. It concluded that "absent some strong indication of legislative intent to the contrary, we must read the words of the statute with their commonly accepted meanings." *Id.*

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[25]*Legislative History of the Equal Employment Opportunity Act of 1972* ("Legislative History"), United States Senate (U.S. Gov't. Printing Office, Washington, D.C., 1972), at page 1844. The Court in *International Brotherhood of Teamsters v. United States*, ... U.S. ....., 97 S.Ct. 1843, 1864, n. 39, found that the 1972 Conference Committee Report was not compelling in that case because the section at issue was part of the 1964 Act. In the instant case, however, public employees were brought under Title VII by the 1972 Amendments and, therefore, the intent of that Congress as expressed in the Conference Committee Report "controls." *Id.*

The Court of Appeals in the instant case recognized the problems inherent in Senator Humphrey's remarks and gave short shrift to the Randolph-Humphrey colloquy:

> "The discussion occurred hours after passage of the Bennett Amendment and cannot be said to be a part of the legislative history of that amendment. The Department claims that although the statement was made after the Bennett Amendment was adopted, it was still made before the Senate voted on the entire Civil Rights Act. Thus, it claims that Senator Randolph and others who may have wanted to preserve such distinctions were misled into not offering a further amendment for that purpose. This argument might have some merit were it not for the fact that the same Congress (the 88th) passed both the Civil Rights Act and the Equal Pay Act, and it seems unlikely that Senator Humphrey's erroneous interpretation of the latter misled many, if any, senators. It certainly misled no members of the House. So far as appears, members of the House never heard of it." 553 F.2d at 589. See also Decision on Petition for Rehearing.

Indeed, every court to consider whether sex-based retirement ages violate Title VII has held that they do. *Chastang v. Flynn & Emrich*, 541 F.2d 1040 (4th Cir. 1976); *Peters v. Missouri Pacific Railroad Co.*, 483 F.2d 490, 492, n. 3 (5th Cir. 1973) (in banc); *Rosen v. Public Service Electric & Gas Co., supra; Bartmess v. Drewrys U.S.A., Inc., supra;* and *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *aff'd on this issue*, 519 F.2d 559 (2d Cir.

1975), *aff'd in part and rev'd in part on other grounds,* 427 U.S. 445, 96 S. Ct. 2666 (1976).

The Court in *General Electric Co. v. Gilbert, supra,* quoted Senator Humphrey's statement to Senator Randolph with apparent approval. 429 U.S. at 144, 97 S.Ct. at 412. Based on this remark, the Court held Labor Department interpretations of Section 6(d) of the Equal Pay Act applicable to Title VII and applied an interpretive regulation issued by the Wage and Hour Administrator to undermine an EEOC construction of Title VII. Respondents do not disagree with the Court's conclusion that Labor Department interpretations of Section 6(d) can be relevant in Title VII actions. (In fact, Respondents have detailed the Labor Department's position above to demonstrate that, unlike in *Gilbert,* its position is consistent with interpretations of Title VII by the EEOC.) Respondents, however, do disagree with the possible inference that sex-based differences of treatment in retirement plans are valid. Because this conclusion was not essential to the Court's decision that General Electric's exclusion of pregnancy disability coverage did not discriminate based on sex, nor even to the Court's rejection of the EEOC guideline, we respectfully suggest for the reasons stated above that Senator Humphrey's remark not be interpreted to achieve this result.

RESPONDENTS ARE ENTITLED UNDEP TITLE VII TO RESTITUTION OF THE CONTRIBUTIONS THEY WERE ILLEGALLY REQUIRED TO MAKE TO WATER AND POWER'S PLAN.

The District Court awarded class members restitution of illegally required contributions from the date the EEOC issued its guidelines prohibiting contribution rate differentials based on sex in retirement plans (April 5, 1972) (29 CFR §§1604.9(b), (e), (f)). This award was affirmed by the Court of Appeals and it should not now be reversed.

The Court in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975), after an extensive analysis of Title VII, concluded that one of its primary purposes is to "make persons whole for injuries suffered on account of unlawful employment discrimination." 422 U.S. at 418, 95 S.Ct. at 2372.[26] Based on this finding, it sanctioned an award of back pay to a class of black employees that had been subjected to various forms of employment discrimination.[27]

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[26]A section-by-section analysis introduced by Senator Williams to accompany the Conference Committee Report on the 1972 Amendments strongly reaffirmed the "make-whole" purpose of Title VII:

> "In dealing with the present section 706(g) [remedies] the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Legislative History, supra,* at 1848.

[27]The Court did not order payment to the plaintiffs because of unresolved factual allegations that the employer was "improperly and substantia'ly prejudiced" by plaintiffs' inconsistent demands for back pay. Rather, the case was remanded to the District Court to review whether the employer was in fact prejudiced. 422 U.S. at 424-425, 95 S.Ct. at 2375.

The instant case is clearly more compelling than *Albemarle* and other cases where back pay is at issue. Because the remedy in cases of that type involve the payment of money which was never actually earned, the award serves not only to make whole individuals who were the targets of employment discrimination, but also to penalize the employer. This is not true, however, in the instant case where Respondents are merely seeking restitution of money they actually earned and had taken away from them in violation of Title VII.

Water and Power's claim that it acted in good faith does not entitle it to keep the additional contributions collected by reason of its discriminatory practice. The Court in *Albemarle* rejected this so-called "good-faith" defense as follows:

> "But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" *Albemarle Paper Co. v Moody, supra,* 422 U.S. at 422, 95 S.Ct. at 2374.

The burden on Water and Power of refunding Respondents' excess contributions is not as significant as it is portrayed. Thus, the Court of Appeals found that:

> "The impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972, to December 31, 1974. This might leave the plan somewhat underfunded, but a number of solutions to that problem are readily available. . . . [W]hatever the adjustments that would have to be made, we do not find that the burden on the pension plan or the Department is sufficient to offset the compelling claim of the plaintiffs to recover the money which they were wrongfully required to contribute." Court of Appeals Opinion, 553 F.2d at 592.

Water and Power likewise is not protected by the doctrine of sovereign immunity contained in the Eleventh Amendment or common law. The simple fact is that "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations." *Mt. Healthy City School Dist. v. Doyle,* .... U.S. ...., 97 S.Ct. 568, 573. Thus, the Eleventh Amendment does not apply to Water and Power which was created under Section 70 of the Los Angeles City Charter.

In any event, the possibility that the sovereign immunity defense might be available in Title VII actions was recently put to rest by the Court in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666 (1976), a case remarkably similar to the instant case. In *Fitzpatrick,* a class of male plaintiffs sued to invalidate "certain provisions in the State's statutory retirement benefit plan [that] discriminated against them because of their sex." 427 U.S. at 448, 96 S.Ct. at 2668. The provisions in question permitted "women employees

having 25 or more years of state service the right to retire with pension rights five (5) years earlier than similarly situated men, and further provide[d] rate differentials favoring female over male employees who retire with less than 25 years of state service." Court of Appeals decision in *Fitzpatrick v. Bitzer*, 519 F.2d 559, 561 (2d Cir. 1975).

The District Court found that these provisions violated Title VII and granted prospective injuctive relief. The Court, however, refused to award retroactive retirement benefits or reasonable attorneys' fees. It held that "both would constitute recovery of money damages from the State's treasur and were therefore precluded by the Eleventh Amend ent and by this Court's decision in *Edelman v. Jordan*, [415 U.S. 651, 94 S.Ct. 1347 (1974)]." 427 U.S. at 450, 96 S.Ct. at 2665. This decision was affirmed by t e Court of Appeals.[28]

This Court, however, reversed the ruling of the lower courts, finding that under Title VII the " 'threshold fact of congressional authorization,' [*Edelman v. Jordan*] 415 U.S., at 672, 94 S. Ct., at 1360, to sue the State as employer is clearly present." 427 U.S. at 452, 96 S. Ct. at 2670. It stated:

> "It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under §5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134

[28]The Court of Appeals reversed the decision of the District Court on the issue of attorneys' fees, however, finding that this award would have only an ancillary effect on the State treasury of the type permitted by *Edelman v. Jordan*.

> U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. [Footnote and citations omitted.]" 427 U.S. at 456, 96 S. Ct. at 2671.

In addition, Los Angeles City Charter, Section 220.1 (f) requires that money deposited in Water and Power's Plan "be kept separate and apart from all other money on deposit with the City Treasurer." Water and Power's chief accounting employee (who is also the chief accounting employee for the administrators of the Plan) is the only person authorized to withdraw money from the Plan. Thus, any recovery in the instant action would not be from City coffers but from the Plan itself.

CONCLUSION.

> "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L.Ed.2d 768." *Frontiero v. Richardson*, 411 U.S 677, 686, 93 S.Ct. 1764, 1770 (1973).

Title VII prohibits an employer from discriminating against "*any individual*" with respect to "conditions of employment" or "employment opportunities" on the basis of sex. (Emphasis added.) Section 703(a)(1), (2).

In enacting Title VII, "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." (Emphasis added and citations omitted.) *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763, 96 S. Ct. 1251, 1263 (1976). Employers are required under Title VII to give "persons of like qualifications . . . employment opportunities irrespective of their sex." *Phillips v. Martin Marietta Corp.*, 400 U.S. at 544, 91 S. Ct. at 497-498.

The reason Congress outlawed sex discrimination in employment is no mystery: women workers consistently have been subjected to a myriad of discriminatory employment practices which in turn has depressed the economic status of women as compared to men. As the House Committee on Education and Labor observed, in explaining the need for the 1972 amendments to Title VII:

> "Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.80% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone." *Legislative History, supra* at page 64.

The House Report further recognized that Title VII was designed to eliminate employment practices that discriminated against women and to improve their employment status:

> 'Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since

its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.

"In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either normally or physiologically justifiable.

"The Committee believes that women's rights are not judicial divertissements. Discrimination against women is not less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." *Id.* at pages 64-65.

See also S. Rep. No. 92-415, Legislative History, *supra*, at 416-417. Water and Power's reliance on sex-segregated mortality tables served to exacerbate this dismal situation of working women. The use of these tables, moreover, was the product of bureaucratic momentum and administrative convenience and did not serve any legitimate business purpose. That Water and Power has successfully operated its Plan for nearly three years without using sex-segregated tables highlights the fact that such practice was totally unnecessary.

For the reasons set forth in this Brief, Respondents respectfully submit that the Judgment of the Court of Appeals be affirmed.

Dated: December 21, 1977.

Respectfully submitted,

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